

ARKANSAS SUPREME COURT

No. CR 05-1303

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered September 21, 2006

PAUL EMERY
Appellant

PRO SE APPEAL FROM THE CIRCUIT
COURT OF JACKSON COUNTY, CR-
96-187, HON. HAROLD S. ERWIN,
JUDGE

v.

AFFIRMED

STATE OF ARKANSAS
Appellee

PER CURIAM

In 1997, appellant Paul Emery was convicted by a jury of one count of rape and one count of first-degree sexual abuse of an eleven-year old, and was sentenced to 600 months' imprisonment. This court affirmed appellant's no-merit appeal filed pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Arkansas Supreme Court Rule 4-3(j)(1). *Emery v. State*, CR 97-993 (Ark. November 4, 1999) (*per curiam*). Subsequently, appellant filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition. Appellant, proceeding *pro se*, sought a belated appeal of the trial court's decision. This court denied the motion. *Emery v. State*, CR 01-49 (Ark. April 5, 2001) (*per curiam*).

Next, appellant filed in the trial court a *pro se* petition for writ of error *coram nobis*. After the trial court denied the petition, appellant sought a *pro se* petition for writ of *certiorari* in this court seeking review of the trial court's decision. We dismissed the petition. *Emery v. State*, CR 02-282 (Ark. May 16, 2002) (*per curiam*). Appellant then filed in this court a *pro se* petition for leave to

file a petition for writ of error *coram nobis* in the trial court. We denied the petition. *Emery v. State*, CR 97-933 (Ark. October 3, 2002) (*per curiam*).

Subsequently, appellant filed in the trial court a *pro se* petition for writ of *habeas corpus* pursuant to Act 1780 of 2001, codified as Ark. Code Ann. §§ 16-112-201–207 (Supp. 2003). The trial court denied the petition, and this court affirmed the decision of the trial court. *Emery v. State*, CR 04-1098 (Ark. May 26, 2005) (*per curiam*). On July 7, 2005, appellant filed in the trial court a *pro se* “Subsequent Application for Writ of *Habeas Corpus*” intended to incorporate the amendments to Act 1780 authorized by Act 2250 of 2005. Therein, appellant claimed “newly surfaced evidence” would prove his innocence, such evidence being a purported recantation by the victim. In addition, appellant contended that the rape kit performed on the victim cannot be located, and alluded to the possibility that the prosecution withheld the rape kit from the defense. The trial court denied the petition without a hearing, and appellant, proceeding *pro se*, has lodged an appeal here from the order.

Initially, we note that appellant filed his subsequent petition for writ of *habeas corpus* prior to the effective date of the amendment to Act 1780. As a result, appellant’s present petition for writ of *habeas corpus* remained subject to the requirements in effect at the time appellant filed his original petition.

In denying his prior petition, this court noted that scientific testing sought by appellant was available at the time of appellant’s trial, and may have been admitted as evidence at that time. Thus, appellant failed to establish an entitlement to relief pursuant to Act 1780.

In his instant petition, appellant likewise failed to establish entitlement to relief under the Act. Here, appellant’s “newly surfaced evidence” was not the sort of evidence subject to scientific

testing as contemplated by the Act. Moreover, in his previous petition, appellant sought to file a supplemental brief containing new evidence, i.e., the same letter from the victim that forms the basis of appellant's petition now before this court. As stated in our order dismissing the prior petition, this court does not consider matters outside the record. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002).

Affirmed.